

OLL 85-2831

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LEGISLATIVE LIAISON

85-2831

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:

Assistant General Counsel
 Logistics and Procurement Law
 Division, OGC

EXTENSION

NO.

STAT

DATE

26 September 1985

TO: (Officer designation, room number, and building)

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OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Director,
 Office of Legislative
 Liaison

I notice that CIA will be invited in the very near future to provide testimony to the Criminal Justice subcommittee of the House Judiciary Committee on application of the espionage laws to persons who leak classified information to the press

2. 7 D 43 HQS

When this happens, the following bit of historical background information may be of interest.

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8. CC: General Counsel w/att

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25 SEP 1985

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MJS
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7 September 1985

Spy laws v. the news

An upcoming House hearing on U.S. espionage laws may turn into an inquiry on how the press handles classified information

By James E. Roper

A House subcommittee has decided to hold hearings on the nation's espionage laws, and some members may use the occasion to examine the role of the news media in publishing classified information.

The hearings, tentatively set to begin Sept. 19, will be conducted by the Criminal Justice subcommittee of the House Judiciary Committee, under

A subcommittee source says some members after hearing testimony at the forthcoming hearings may want to use the espionage laws to curb reporting by news media.

the chairmanship of Rep. John J. Conyers Jr., D-Mich.

The inquiry was provoked mostly by allegations of spying by ex-Navy officer John Walker and his son, Michael. The investigation, however, will go beyond the problem of so-called professional spies.

It will look into the case of Samuel Morison, an analyst at the Naval Intelligence Support Center. Working as a stringer and with his superior's knowledge, he sold classified information to *Jane's Defense Weekly*, including a satellite picture showing damage done by an explosion at Severomorsk, a Soviet naval base near Murmansk on the Kola peninsula. He was indicted last October on criminal charges of violating espionage laws — specifically, unauthorized possession of classified documents, theft and conversion of government property, and transmittal of classified data to a person "not entitled to receive them."

A lawyer for the American Civil Liberties Union, Morton H. Halperin, compares the action with enforcement of Great Britain's Official Se-

crets Act of 1911 under which not only the official providing classified information but the newspaper that publishes it can be prosecuted.

A subcommittee source says some members after hearing testimony at the forthcoming hearings may want to use the espionage laws to curb reporting by news media. Other members are described as steadfastly opposed to any such suggestion. Still other members are said to be uncertain about press issues that may arise.

Subcommittee Chairman Conyers, a director of the American Civil Liberties Union, is deemed likely to defend press operations. He intends to invite testimony from representatives of media groups such as the Reporters Committee for Freedom of the Press.

He also will invite testimony from the Reagan Administration and federal security organizations, giving them the opportunity to explain policies toward applying espionage laws to persons who leak classified information to news reporters, or to reporters or newspapers who publish the information.

For more than three months, John Martin, chief of the Internal Security Section of the Criminal Division of the Justice Department, has been un-

The Judge's opinion drew an editorial from the Washington Post, which cautioned against turning the U.S. anti-espionage laws of 1917 into an Official Secrets Act.

available to a reporter seeking clarification of administration policies toward the espionage laws and the press.

The House Judiciary subcommittee does not have a specific bill to debate, but, according to a subcommittee

source, may prepare one if the testimony produces a consensus on what to do.

Besides Conyers, members are Democrats Don Edwards, Calif.; Barney Frank, Mass.; Howard L. Berman, Calif.; and Frederick C. Boucher, Va.; and Republicans George W. Gekas, Pa.; Patrick L. Swindall, Ga.; and Howard Coble, N.C.

The Morison case has been set for

A lawyer for the American Civil Liberties Union, Morton H. Halperin, compares the action with enforcement of Great Britain's Official Secrets Act of 1911 ...

trial in U.S. District Court in Baltimore Oct. 8. Already, lawyers for the defendant have lost an attempt to have the indictment dismissed. They argued that the espionage laws were written to prevent transmission of classified material to foreign powers, not the American press. They said the statutes were "impermissibly vague and overbroad" when applied to the leak of classified information from a federal employee to an American news reporter.

U.S. District Judge Joseph H. Young in Baltimore, in refusing to dismiss the indictment, declared March 12: "If Congress had intended this situation to apply only to the classic espionage situation, where the information is leaked to an agent of a foreign and presumably hostile government, then it could have said so by using the words 'transmit...to an agent of a foreign government.'

"In 18 U.S. Code paragraph 749, Congress did precisely that, proscribing the gathering or delivering of

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national defense information to a foreign government or to an agent, employee, subject or citizen thereof. Section 793, on the other hand, proscribes disclosure of national defense information to those 'not entitled to receive it.'

"Finally, the danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government. The fear of releasing this type of information is that it gives other nations information concerning the intelligence gathering capabilities of the United States. That fear is realized whether the information is released to the world at large or whether it is released only to specific spies.

"Defendant claims that by enforcing this statute in the present case involving the release of information to the press, this court would be writing a new law, a task, it is argued, better left to Congress. On the contrary, to read into the statute the requirement that it apply only in 'classic espionage' cases where the disclosure is to an agent of a foreign government would be to ignore the plain language of the law as presently written."

Judge Young acknowledged, "As the defendant properly notes, there has been no definitive court test of the applicability of 18 U.S. Code paragraph 641 (another part of the so-called espionage laws barring theft of government property) to unauthorized disclosure of classified information."

He continued: "Defendant has argued that even if paragraph 641 can be applied to the unauthorized taking of government information in this case, it should not be applied where the taking involves public disclosure in circumstances which implicate First Amendment issues. Defendant argues that in all cases in which paragraph 641 has been applied to the theft of information, the information was being acquired for private, covert use in illegal enterprises..."

"Defendant argues that using paragraph 641 to regulate the disclosure of government information gives executive branch officials unbridled discretion to enforce the statute and thereby control the flow of government information to the public.... Thus, government officials would be free to enforce their own information control policy, and liability may turn on nothing more than the fact that the disclosure embarrasses them or subjects them to public criticism.

"These arguments have little to do with this case. It is most doubtful that Morison was asserting a First Amendment right in selling photographs and documents to Jane's. It is clear that having decided that disclosures of classified information may be prosecuted under paragraph 641, the defendant's motive in disclosing classified information is irrelevant."

The judge's opinion drew an editorial from the *Washington Post*, which cautioned against turning the U.S. anti-espionage laws of 1917 into an Official Secrets Act.

"The difficulty always arises in determining which information is potentially damaging to national security and which is simply embarrassing to the government in power," said the Post editorial. "Which whistle blowers do a service by forwarding information to Congress and the press and which — can you think of a single case? — actually put the country in jeopardy? In a society dependent on informed debate, the presumption must be that the work product of the government belongs to the people.

"The exceptions — real military secrets, not, for instance, cost overruns — must be few and far between and covered by carefully crafted statutes. Broad secrecy laws cripple a free society and must be resisted."

Intelligence in the War of Independence



A Bicentennial Publication of the
Central Intelligence Agency Washington, D.C.

The Committee of Secret Correspondence

Recognizing the need for foreign intelligence and foreign alliances, the Second Continental Congress created the Committee of Secret Correspondence by a resolution of November 29, 1775:

"RESOLVED, That a committee of five be appointed for the sole purpose of corresponding with our friends in Great Britain, Ireland and other parts of the world, and that they lay their correspondence before Congress when directed.

"RESOLVED, That this Congress will make provision to defray all such expenses as they may arise by carrying on such correspondence, and for the payment of such agents as the said Committee may send on this service."

The five Committee members—America's first foreign intelligence directorate—were Benjamin Franklin of Pennsylvania, Benjamin Harrison of Virginia, John Jay of New York, John Dickinson of Pennsylvania and Thomas Johnson of Maryland. Subsequent appointees included James Lovell, a teacher who had been arrested by the British after the Battle of Bunker Hill on charges of spying. He had later been exchanged for a British prisoner and was then elected to the Continental Congress. On the Committee of Secret Correspondence he became the Congress' expert on codes and ciphers.

Thomas Paine, author of "Common Sense," was briefly the secretary of the Committee, but was discharged for divulging information from Committee files.

The Committee employed secret agents abroad, established a courier system, and developed a maritime capability apart from that of the Navy. It met secretly in December of 1775 with a French intelligence agent who visited Philadelphia under the cover of a "Flemish merchant," and engaged in regular communications with Britons and Scots who were sympathetic to the patriots' cause.

On April 17, 1777, the Committee of Secret Correspondence was renamed the Committee of Foreign Affairs, but continued with its intelligence function. Matters of diplomacy were conducted by other committees or by the Congress as a whole. With the creation of a Department of Foreign Affairs—the forerunner of the Department of State—on January 10, 1781, correspondence "for the purpose of obtaining the most extensive and useful information relative to foreign affairs" was shifted to the new body, whose secretary was empowered to correspond "with all other persons from whom he may expect to receive useful information. . . ."

First Chief Justice
of the U.S. Supreme Court

d'Estaing's French fleet cast anchor in the Delaware River. France was in the war; the mission to Paris had succeeded.

Spain, at the urging of French Foreign Minister Vergennes, matched France's one million *livres* for the operation of *Hortalez et Cie*. But that was not the beginning of secret Spanish aid to the patriots. During the summer of 1776 Luis de Unzaga y Amezaga, the governor of New Spain at New Orleans, had "privately delivered" some twelve thousands pounds of gunpowder, "out of the King's stores," to Captain George Gibson and Lieutenant Linn of the Virginia Council of Defense. The gunpowder, moved up the Mississippi under the protection of the Spanish flag, made it possible to thwart British plans to capture Fort Pitt.

Oliver Pollock, a New Orleans businessman, had interceded on behalf of the Virginians. When Bernardo de Galvez became governor at New Orleans, Pollock—soon to be appointed the agent of the Secret Committee at New Orleans—worked closely with the young officer to provide additional supplies to the Americans. The Spanish governor also agreed to grant protection to American ships while seizing British ships as "smugglers," and to allow American privateers to sell their contraband at New Orleans. Havana, too, became a focal point for dispensing secret Spanish aid to the American revolutionists.

From Galvez the patriots received gunpowder and supplies for the George Rogers Clark expedition, and from Galvez' "very secret service fund" came the funds used by Colonel Clark for the capture of Kaskaskia and Vincennes.

When Spain formally entered the war on the American side on June 21, 1779, Oliver

Pollock—who suffered personal bankruptcy in funding the purchase of supplies for the patriot cause—rode as aide-de-camp to Galvez in the capture of Baton Rouge, Natchez, Mobile, and Pensacola.

Another center of secret aid to the patriots was St. Eustatius Island in the West Indies. A Dutch freeport set in midst of English, French, Danish and Spanish colonies, St. Eustatius became—in the words of a British intelligence document of the period—"the rendezvous of everything and everybody meant to be clandestinely conveyed to America." It was a major source of gunpowder for the patriot cause, and perhaps the safest and quickest means of communications between American representatives and agents abroad and with the Continental Congress at home.

The Continental Congress, sensitive to the vulnerability of its covert allies, respected their desire for strict secrecy. Even after France's declaration of war against England, the fact of French involvement prior to that time remained a state secret. When Tom Paine, in a series of letters to the press, divulged details of the secret aid from the files of the Committee of Foreign Affairs (formerly the Committee of Secret Correspondence), France's Minister to the United States, Conrad Alexandre Gerard, protested to the President of the Congress that Paine's indiscreet assertions "bring into question the dignity and reputation of the King, my master, and that of the United States." Congress dismissed Paine, and by public resolution denied having received such aid, resolving that ". . . His Most Christian Majesty, the great and generous ally of the United States, did not preface his alliance with any supplies whatever sent to America. . . ."



Bernardo de Galvez



Conrad Alexandre Gerard



Johann Baron de Kalb